IN THE MISSOURI SUPREME COURT

No. 84563

SIX FLAGS THEME PARKS, INC.,

Appellant,

DIRECTOR OF REVENUE,

Respondent.

BRIEF ON BEHALF OF RESPONDENT DIRECTOR OF REVENUE

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Statutes[1]

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[1]The statutory provisions at issue in this case are the same in 2000 Revised Statutes of Missouri as they were during the tax period in question under RSMo 1994.

JURISDICTIONAL STATEMENT

The director does not contest the jurisdictional statement asserted in the appellant's brief.

STATEMENT OF FACTS

Admission Tickets and Season Passes

Six Flags Theme Parks, Inc. operates an amusement park in Eureka, Missouri. L.F. at 10-11. In addition, Six Flags owns and operates several other amusement parks throughout the United States, L.F. at 11, and Six Flags is affiliated with still other amusement parks using the "Six Flags" name that are not owned by Six Flags Theme Parks, Inc. L.F. at 11. All of these amusement parks, like Six Flags' Eureka, Missouri facility, are "places of amusement" that contain roller coaster rides, carnival games, video games, and other forms of entertainment like diving exhibitions and stage acts. L.F. at 11.

To be allowed admittance to Six Flags' Eureka, Missouri facility, a patron must present either a single-day admission ticket or a season pass. L.F. at 11. The season passes sold by Six Flags' Eureka, Missouri facility entitle holders to unlimited visitation through a scheduled operating season not only to the Eureka, Missouri facility, but to all other Six Flags theme parks. L.F. at 11. With the exception of some tickets purchased under a joint ticket program with the Chicago Six Flags facility, admission tickets sold by Six Flags' Eureka, Missouri facility entitle the holders of those tickets only to admission at the Eureka, Missouri facility for one day. L.F. at 11. The holder of an admission ticket gains admission to the Eureka, Missouri facility by presenting the ticket at the Eureka, Missouri facility's gate. L.F. at 11-12. An attendant at the Eureka, Missouri facility keeps the ticket and allows the customer to enter the facility. L.F. at 12.

The Eureka, Missouri facility sold season passes and admission tickets in two ways. L.F. at 12. Some customers purchased admission tickets and season passes to the Eureka, Missouri facility by being physically present at the facility. L.F. at 12. The other method by which Six Flags' Eureka, Missouri facility sold season passes and admission tickets was by mail or phone. L.F. at 12. Six Flags' Eureka, Missouri facility accepted payment for season passes and/or admission tickets by credit card, check, or money order mailed to Six Flags' Eureka, Missouri facility. L.F. at 12. Six Flags then sent the purchaser season passes or admission tickets through the United States Mail, United Parcel Service, or Federal Express. L.F. at 12. Some of these telephone or mail order tickets were sent to customers with mailing addresses outside of Missouri. L.F. at 12. It is the sales tax paid on these tickets that is the subject of this lawsuit. L.F. at 13, note 3.

After the physical transfer of an admission ticket or season pass from Six Flags to the customer, the customer bore the risk of theft or loss. L.F. at 13. Six Flags had no obligation to replace lost or stolen admission tickets or passes. L.F. at 13. For admission tickets and passes delivered to customers through mail or courier, Six Flags would replace those tickets or passes lost or stolen prior to delivery to the customer. L.F. at 13. Thereafter, the customer bore risk of theft or loss. L.F. at 13.

In order to use a season pass, the holder of a season pass was required to "register" the season pass at the Six Flags' facility from which it was purchased. L.F. at 13. The holder could then use the season pass at that facility's gate to gain admission for the first

time in a season. L.F. at 13. Unlike the admission tickets, which were retained by an attendant at the facility, customers retained season passes even after their first admission to the facility. L.F. at 13. After registering a season pass, its holders could use the pass at all Six Flags facilities without any additional registration or payment. L.F. at 13. For admission tickets purchased through the joint ticket program between Six Flags' Eureka, Missouri facility and Six Flags' Chicago facility, Six Flags cannot determine how many admission tickets were sold by the Eureka, Missouri facility and used at the Chicago facility or vice versa. L.F. at 13-14. Moreover, Six Flags cannot determine the number of admission tickets sold at the Eureka, Missouri facility that were lost or stolen and thus never used to gain admittance to the Eureka, Missouri facility. L.F. at 14. However, Six Flags believes that number to be minimal. L.F. at 14.

Coin-Operated Video Games

One form of amusement available to patrons of Six Flags' Eureka, Missouri facility was access to video games. L.F. at 14. The video games are cash operated amusement devices that allow customers to test their skill by playing against a machine. L.F. at 14. Customers played video games by putting the requisite amount of cash directly into the game. L.F. at 14. Only at the time during which the customer purchased the right to play a video game did that customer have any exclusive right to play the game. L.F. at 14. The video game machine itself could not be removed by the customer from its location. L.F. at 14.

Six Flags did not own the video games at its Eureka, Missouri facility. L.F. at 14. Six Flags supplied the video games with electric power and removed cash from the video games on a periodic basis. L.F. at 14. The owner of the video games paid the Missouri sales or use tax on the purchase of the video game units themselves. L.F. at 14. Six Flags had a contract with the owner that allowed the owner to place the video games at the Eureka, Missouri facility. L.F. at 14-15. Pursuant to that contract, Six Flags and the owner split receipts from the video games evenly. L.F. at 15. Six Flags collected and remitted all the sales tax on the video game receipts pursuant to its contract with the video games' owner. L.F. at 15.

Six Flags' customers admitted to the Eureka, Missouri facility paid the requisite fee to play the video games but were entitled to no benefit other than the temporary and exclusive right to play the video game. L.F. at 15. Customers were not eligible to win any prize or to use any other property in exchange for paying the requisite fee to play a video game. L.F. at 15.

Sales Taxes Disputed

From July 1995 through November 1998, the tax period relevant to this case, Six Flags collected and remitted Missouri sales tax and related local sales tax on all season passes and admission tickets that were sold on behalf of its Eureka, Missouri facility. L.F. at 15. That was the case regardless of whether the season passes or admission tickets were sold at the Eureka, Missouri facility itself or delivered to their purchaser by courier. L.F.

at 15. Six Flags remitted $557,342.21 in sales tax on the sale of admission tickets and season passes that were transferred from Six Flags in Missouri to customers outside of Missouri. Six Flags paid no state or local sales or use taxes other than to the State of Missouri on these season passes and admission tickets to its Eureka, Missouri facility. L.F. at 15.

During the same tax period, Six Flags collected and remitted Missouri sales tax and related local sales tax on video game receipts at the Eureka, Missouri facility in the total amount of $55,321.59. L.F. at 15.

On October 5, 1999, Six Flags filed a claim for refund on the Missouri sales tax and use tax for the season passes and admission tickets that were sold to customers outside of Missouri. L.F. at 16.

The director's policy, by regulation and otherwise, is to collect sales tax on gross receipts paid to places of entertainment or amusement for tickets to enter such places, whether or not the purchaser of the ticket is ever admitted to the place of entertainment or amusement. L.F. at 16. The director grants no refunds of the tax remitted on gross receipts from the sale of tickets that are not used unless the seller of the ticket grants refunds to the buyers of the unused tickets. L.F. at 16. The director's policy is not to collect taxes on gross receipts received in Missouri from the sale of tickets to enter places of amusement and entertainment that are located outside of Missouri because the places of amusement and entertainment are not located within the State of Missouri. L.F. at 17.

ARGUMENT

I. Six Flags Theme Parks, Inc. is not entitled to a sales tax refund claim for tickets because the "in commerce" exemption provided by section 144.030.1 does not apply in that even tickets delivered to customers outside of Missouri can only be redeemed for admission at the Eureka, Missouri Six Flags theme park making the transaction a local one. (Response to appellant's Point Relied On I)

The director of revenue can collect sales tax on admission ticket and season passes to Six Flags' Eureka, Missouri facility sold to out-of-state customers because admission tickets and fees paid to or in a place of amusement are taxable, and the exemption for in commerce transactions does not apply. A ticket or pass, even if delivered to a customer outside of Missouri, has no use until and unless that customer presents the ticket or pass at Six Flags' Eureka, Missouri facility. Thus, "importation" (or exportation across state lines) is not an essential feature of the transaction.

Six Flags does not dispute that Missouri taxes the sale of admission tickets or fees to places of amusement, entertainment, and recreation. The tax, imposed by § 144.020.1, is upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state.[2] But Six Flags claims that it is entitled to an exemption pursuant to section 144.030.1. That section exempts for sales tax

[2] A copy of Section 144.020 RSMo 2000 appears in the Appendix, pages 18-19.

such retail sales as may be made in commerce between this state and any other state of the United States, or between this state and any foreign country.[3] Six Flags calls that the "in commerce" exception.

Six Flags claims that when it mails tickets or a season pass to an out-of-state address, it is invoking the "in commerce" exception. Six Flags cites *Western Trailer Service, Inc. v. Lesage*, 575 S.W. 2d 173 (Mo. banc 1978), for the generic premise that §144.030.1 applies when in commerce "importation" (in this case, exportation) is an essential feature of component of the transaction.

That analysis is superficial. It assumes that Six Flags' mailing the ticket or pass to a customer outside of Missouri is the essential feature or component of the transaction. Mailing the ticket or pass is merely a component of the transaction. It is not an essential feature or component. It is not essential because regardless of where Six Flags' mails the ticket or pass, the ticket or pass holder can only gain admission to Six Flags' Eureka, Missouri facility by presenting himself in person at the facility. Even season passes that can be used at other affiliated Six Flags' facilities around the United States, if sold by Six Flags' Eureka facility, must be activated by the holder's presenting himself in person at the Eureka, Missouri facility.

In essence, delivery of the ticket, in-state or out-of-state, is meaningless. The ticket has to come back to Missouri in order to fully consummate the transaction between Six

[3] A copy of Section 144.030 RSMo 2000 appears in the Appendix, pages 20-25.

Flags' and its customers. One can analogize it to a simple contract. Providing the ticket or pass in exchange for the purchase price is only part of the consideration. The real consideration is admitting the ticket or pass holder to the Eureka, Missouri Six Flags' facility. And that only comes about if and when the holder presents himself at Six Flags in Eureka, Missouri. Therefore, the transaction is a local one. The money for the ticket is received in Missouri, as is the value of what that money purchases - amusement, entertainment, and recreation in Eureka, Missouri.

Six Flags erroneously asserts that the AHC "claimed to rely" on *Bratton Corporation v. Director of Revenue*, 783 S.W.2d 891 (Mo. banc 1990), in reaching its conclusion that the transaction is an exempt in commerce transaction. (Appellant's brief at 18). But, the AHC never claimed to rely on *Bratton* in issuing the decision to which Six Flags' appeals. The AHC simply distinguished the nature of the transaction in *Bratton* from the one present in this case. L.F. at 42. That distinction is based largely on *Bratton's* involving tangible personal property.

Six Flags wants this Court to pigeon-hole the transaction between it and out-of-state customers as a sale of tangible personal property to claim the §144.030.1 exemption. The AHC refused to do so, and was correct not to.

Realistically, no one buys the admission ticket or season ticket to Six Flags to hold the ticket as a piece of tangible personal property, like they might with a collector's edition baseball card. People buy the ticket or the admission pass to gain admission to Six Flags in

Eureka, Missouri to have fun, at an amusement park, which is a place of amusement, entertainment or recreation.

So when Six Flags claims that the AHC added words to section 144.030.1, to limit the in commerce exemption to the sale of tangible personal property, it is missing the AHC's point. The AHC does not actually do that. It merely distinguished the nature of the sales transaction here with the one in *Bratton* based on the difference between tangible personal property and a service. Its doing so showed that in commerce importation (exportation) was not an essential feature or component of the ticket sales here.

What the AHC found is that this case involves the sale of a service. L.F. at 42-43. The true object of the transaction was admission to an amusement park. No where does the record reflect that the purchaser of an admission ticket or season pass does so to collect, but never use, the ticket itself. The ticket is merely evidence that its holder paid for admission to Six Flags' in Eureka, Missouri. That transaction is not complete until Six Flags' performs by providing consideration for the paid admission fee - that consideration is admittance to the amusement park in Eureka, Missouri. Therefore, Six Flags' argument regarding §144.030.1 not being limited to tangible personal property is a red herring. The AHC never made that claim, either expressly or by implication, in its opinion.

Six Flags also cites *Lynn v. Director of Revenue,* 689 S.W.2d 45 (Mo. banc 1985), and *Branson Scenic Railway v. Director of Revenue,* 3 S.W.3d 788 (Mo. App. W.D.

1999), in its attempt to reverse the AHC's decision.[4] But neither case helps Six Flags; in fact, quite the opposite, both cases harm Six Flags' argument.

On their faces, *Lynn* and *Branson* demonstrate that an admission fee for an amusement that commences and ends in Missouri is taxable and that an incidental contact with another state, in each case, physically crossing the Missouri border into a neighboring state, does not rise to the level of "essential feature or component" of the transaction.

In *Lynn v. Director of Revenue*, a taxpayer who operated an excursion boat along the Missouri River challenged an assessment by the director of revenue. The director assessed sales tax liability for admission fees for the excursions. *Lynn* at 46. The excursions departed and returned to a point in Missouri near "the vicinity of Kansas City." *Id.* The vessel described in *Lynn* did traverse into Kansas as the navigational channel requires. *Id*. The Court in *Lynn* cited *Complete Auto Transit, Inc. v. Brady*, 43 U.S. 274, 51 L.Ed.2d 326, 97 S.Ct. 1076 (1977), reh'g denied, 430 U.S. 976, 52 L.Ed.2d 371, 97 S.Ct. 1669 (1977), for the premise that the commerce clause does not absolutely forbid local regulation of interstate commerce when there is substantial nexus with the taxing state. *Lynn* at 47.

[4] Copies of the *Lynn* and *Branson* decisions are reproduced in the Appendix at pages 11-17 and 6-10, respectively.

In *Lynn*, the passengers did not board the vessel with the expectation that they be carried to another port at the end of the voyage. *Lynn* at 48. "The sole objective of boarding the vessel is for personal recreation and diversion. The use of the taxpayer's vessel and barge is not 'transportation.'" *Id*. Therefore, the Supreme Court held, it did not matter whether the taxpayer's services were considered transportation or otherwise interstate commerce. It was not transportation that was being taxed. Rather, the object of taxation in the *Lynn* case was the admission fee charged for a place of amusement and recreation. *Id.*

The obligation to pay for the excursions arises solely in Missouri. *Lynn* at 48. The Court even addressed a situation taking place in *Lynn* where the taxpayer occasionally collected the final portion of the excursion fare while on the Kansas side of the Missouri River. *Id.* It dispensed with that argument by saying that the duty to pay the fare arises before the vessel leaves the Missouri-based dock. *Id.* "It is clear that the admission fees charged by the taxpayer are solely Missouri retail sales, and, therefore, the exemption provided in §144.030.1, RSMo Cum. Supp. 1984, does not apply." *Id.*

The same holds true in this case. It is not the paper ticket that is being taxed. Rather, it is the admission to Six Flags, specifically in Eureka, Missouri, that is the subject of taxation. It is the admission fee that is being charged for amusement, entertainment or recreation.

This Court stated in *Lynn*, "[A]lthough admission fees to a place of amusement and items sold therein are retail sales [citations omitted], the fees charged are not retail sale transactions 'made in interstate commerce.' [citation omitted]. Instead, the admission fees are purely local transactions." *Lynn* at 48.

In *Branson Scenic Railway v. Director of Revenue*, the Court of Appeals, Western District, dealt with a case involving sales tax on an admission fee to ride an excursion train that originated in Branson, Missouri and occasionally crossed the Missouri-Arkansas border. The taxpayer in *Branson* claimed that crossing the border into Arkansas made the purchase of ticket sales to ride the excursion train a sale in interstate commerce and therefore exempted by § 144.030.1. *Branson* at 789-790.

The AHC disagreed. It affirmed the director's denial of the taxpayer's refund. The Court of Appeals, Western District, affirmed the AHC's decision. In *Branson*, all the trips began and ended in Branson, Missouri. *Branson* at 790. The excursion train stopped in Arkansas only when the engineer moved to the other end of the train for the return trip to Branson and not at a particular railway station. *Id.* Branson, Missouri was the only place passengers could board or end their trip. *Id.* The court of appeals stated that the determination of the *Branson* case turned on the nature of what the director sought to tax. If the director was taxing only the fee that the railway charged to get a ride on its trains, the tax was permissible as a fee paid to or in a place of amusement, entertainment or recreation. *Id., citing Lynn v. Director of Revenue*, 689 S.W.2d 45, 48 (Mo.App.) (Mo.

banc 1985). That is because the railroad in *Branson* was in the entertainment business, not the railroad business. *Branson* at 790. The Arkansas or out-of-state scenery was merely part of that entertainment, but getting to Arkansas was not the object. *Id.*

The *Branson* court further explained its reliance on *Lynn*. It stated

> The Supreme Court held in *Lynn* that in such cases the director's assessment of tax on the admission fee is lawful. [Citation omitted.] In *Lynn*, the court considered fees paid for river boat rides which crossed state boundaries. The court looked to the operation's purpose–whether it was to amuse or to transport–in deciding how to characterize the business: 'Passengers do not board the vessel with the expectation that they will be carried to another port by the end of the voyage. The sole objective of boarding the vessel is for the personal recreation and diversion. The use of the taxpayer's vessel and barge is not 'transportation.' It is used for entertainment purposes[.]'" *Id.* at 790.

The Court concludes that the director's assessing a tax on an admission fee to a place of amusement is "purely a local transaction." *Id.* at 792.

Likewise, the sale of the admission ticket or season pass to Six Flags' Eureka, Missouri facility to an out-of-state customer is a local one. It does not end with the

customer's receipt of that admission ticket or season pass. The ticket or pass physically received is not the object of what the customer is purchasing. Rather, the customer is purchasing is an admission to a Missouri amusement facility. The ticket itself, as an item of tangible personal property, is functionally worthless. It only has value when presented for admission in Eureka, Missouri at the Six Flags Amusement Park.

If there were some doubt about whether the exemption statute could be stretched to cover Six Flags' sales of tickets and passes to out-of-state customers, it is not sufficiently supported by the facts or law of this case to warrant reversing the AHC. Under certain circumstances, the director has the burden of proof with respect to any factual issue relevant to ascertaining a taxpayer's liability. Section 136.300.1, RSMo 2000. But, a taxpayer claiming an exemption from tax bears the burden of proof. Section 136.300.2, RSMo 2000. Taxation is the rule; exemptions from taxation are the exception. *Spudich v. Director of Revenue*, 745 S.W.2d 677, 682 (Mo. banc 1988). Tax exemption statutes are, therefore, construed strictly against the taxpayer. *Spudich* at 682 *citing Missouri Church of Scientology v. State Tax Commission,* 560 S.W.2d 837, 844 (Mo. banc 1977) and *King v. Franco*, 653 S.W.2d 259, 260 (Mo. App. 1983). Also *see Lincoln Industrial, Inc. v. Director of Revenue*, 51 S.W.3d 462, 465 (Mo. banc 2001). The burden is on the taxpayer to prove that his property fell within an exempted class. *Spudich* at 682, *citing City of St. Louis v. State Tax Commission,* 524 S.W.2d 839, 844 (Mo. banc 1975).

Six Flags Theme Park, Inc. bears the burden of proving it is entitled to a refund. The nature of the transaction coupled with the courts' holdings in *Lynn* and *Branson* show that Six Flags has not and cannot meet that burden with respect to the admission tickets and season passes its sells to out-of-state customers for admission to the Six Flags amusement park in Eureka, Missouri.

II. Six Flags Theme Parks, Inc. is not entitled to a sales tax refund for the sales tax collected from coin operated video machines because this Court, in *Bally's LeMan's Fun Centers v. Director of Revenue,* has already ruled that the proceeds of coin-operated video games are subject to sales tax. (Response to appellant's Point Relied On II)

In a decision Six Flags ignores, this Court has previously adjudicated the question of whether the proceeds of coin-operated games at a place of amusement are subject to sales tax. *Bally's LeMan's Family Fun Centers, Inc. v. Director of Revenue*, 745 S.W.2d 683 (Mo. banc 1988).[5] This Court held that they were. There is no basis for distinguishing the facts here. And, Six Flags makes no policy or statutory construction argument to overrule *Bally's*.

In *Bally's*, the taxpayer operated video arcades filled with coin-operated video games. *Id.* at 683. The director assessed a sales tax on the proceeds from the operation of the coin-operated games. *Id.* The AHC upheld the director's sales tax assessment because "Bally's Fun Centers" are places of amusement. *Id.*

In affirming the AHC's decision, this Court cited § 144.020.1(2), which assesses a tax equivalent to 4% on the amount paid for admissions, seating accommodations, fees paid to or in any place of amusement, entertainment or recreation, games, and athletic events.

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[5]A copy of the *Bally's* decision is reproduced in the Appendix at pages 1-5.

Bally's at 684. The Court stated that the language in § 144.020.1(2) is clear and unambiguous as applied to the facts in *Bally's*. *Id.* The Court found that "the statute plainly provides for a sales tax to be imposed on: (1) sums paid for admission to places of amusement, etc.; (2) amounts paid for seating accommodations therein; and (3) all fees paid to, or in places of amusement, etc." *Id.*

Like the "Bally's Fun Centers," Six Flags' Eureka, Missouri facility is a place of amusement. L.F. at 11. And, as in *Bally's*, amusement is the "raison d'etre of the enterprise." L.F. at 11 and *Bally's* at 684. Therefore, as in *Bally's*, "[m]oneys paid to Bally [Six Flags] to operate its coin-operated devices are, therefore, 'fees paid to, or in place of amusement.'" *Id.* Because § 144.020.1(2) expresses a legislative intent to tax all fees paid in places of amusement, the proceeds of coin-operated video games are subject to sales tax. *Bally's* at 685. That includes the proceeds from video games at Six Flags.

Bally's has not been overturned by this Court. It is valid law and was so during the tax period relevant to this lawsuit. Six Flags does not argue for a change of law. Rather, it asserts that taxing the proceeds of the coin-operated video games is a double taxation. Six Flags cites § 144.020.1(8), RSMo 1994, for the premise that if a lessor of tangible personal property had previously purchased the property, and the tax was paid at the time of the purchase, the lessor shall not apply or collect the tax on the subsequent lease of the property. Appellant's Brief at p. 24.

Six Flags' argument has two fatal flaws. First of all, Six Flags does not own the video games from which it collected the sales tax. So Six Flags never paid sales tax on the purchase of the video game machines housed at its Eureka facility. Therefore, Six Flags cannot claim that it has been "double-taxed" for the purchase of the video games themselves and, subsequently, for the proceeds that come from Six Flags' patrons playing the video games.[6] Secondly, to say that patrons who play a video game at an arcade "lease the video game" stretches the commonly understood concept of lease beyond its traditional meaning.

"Lease" is fairly broad term that encompasses, among other things, concepts of control, possession, and use. For example, *see* § 400.2A-103(1)(j) which defines "lease" as follows:

> Lease means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including the sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.

[6] Moreover, Six Flags' collected the sales tax at the expense of its patrons. Allowing it to claim an exemption would grant it a windfall at their expense.

A video game player certainly uses a video game. But to claim that Six Flags transfers possession of a video game to its player unrealistically expands a common sense concept of possession. The video game player is paying for amusement. There is a very limited amount of control. For example, the player may not move the game during the term of play. Control of the video game is still within the possession of Six Flags. What is really taking place is that the player is paying for the interactive amusement offered by the video game.

Finally, the 1999 enactment of § 144.518, RSMo (2000), suggests that for the tax period in question (1995-1998), the proceeds of coin-operated video games at Six Flags were subject to sales tax. Section 144.518 creates an exemption from sales tax on the purchase of coin-operated video game machines where sales tax is paid on the gross receipts derived from the use of commercial, coin-operated amusement and vending machines. Specifically, it states: "In addition to the exemptions granted pursuant to section 144.030, there is hereby specifically exempted from the provisions of sections . . . 144.010 to 144.525 . . . machines or parts for machines used in a commercial, coin-operated amusement and vending business where sales tax is paid on the gross receipts derived from the use of commercial, coin-operated amusement and vending machines." Section 144.518's enactment suggests that the legislature understood the proceeds of operations of video games to be subject to sales tax, and by implication, that paying to play video games is not a lease transaction, the kind of which benefits from §144.020.1(8)'s

exclusion. Section 144.518 alleviated the concern about "double taxation" - not by exempting from sales tax the proceeds of the coin-operated video games' operation, but rather, by exempting from sales tax the actual purchase price of the machinery. From a policy perspective, that makes sense. The sale of the video game machinery is a very different transaction than the coin-operated use of that video game for amusement. The former is finite. The latter is, conceptually, a potentially infinite source of revenues. It makes sense from a taxing perspective to tax the use rather than the one-time sale of the machinery.

Accordingly, because both statutory and case law so clearly assess a tax on the proceeds of coin-operated video games, Six Flags is not entitled to a refund of sales tax paid from those proceeds.

Conclusion

The director respectfully requests that this Court affirm the AHC's decision by reaffirming that (1) that the sale of admission tickets or fees to a place of amusement, entertainment or recreation, located in Missouri, is a local transaction subject to sales tax assessment under §144.020.1(2), that does not implicated the "in commerce" exemption set forth in §144.030.1; and (2) that the proceeds of coin-operated video games at a place of amusement, during the tax period in question, are also subject to sales tax assessment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 5679 words, including the cover, this certification but excluding the appendix, as determined by WordPerfect 9 software; and

2. That the attached brief includes all the information required by Supreme Court Rule 55.03;

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